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IN THE

Supreme Court of the United States

OCTOBER TERM, 1975

No. 75-1216

NATIONAL ASSOCIATION OF RADIOTELEPHONE SYSTEMS,
Petitioner,

v.

FEDERAL COMMUNICATIONS COMMISSION, *et al.*,
Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

REPLY OF PETITIONER TO BRIEFS IN OPPOSITION

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REPLY OF PETITIONER TO BRIEFS IN OPPOSITION

Petitioner is in receipt of a timely-filed brief in opposition to its Petition for Writ of Certiorari, submitted by the National Association of Business and Educational Radio, Inc. ("NABER") on April 16, 1976, and a late-filed brief in opposition, submitted by the federal respondents (the "government") on May 6, 1976.

THE ISSUES BEFORE THE COURT

Petitioner—on behalf of the approximately 550 independent, small business members of the nationwide Radio Common Carrier ("RCC") industry—seeks re-

view by this Court of a decision of the United States Court of Appeals for the District of Columbia Circuit (the "Court of Appeals") (per Wilkey, Cir. J.)[1] affirming a rulemaking proceeding of the Federal Communications Commission (the "FCC")[2] under the "public convenience, interest or necessity" standard of the Communications Act of 1934 (the "Act"). (47 U.S.C. § 303). The purpose and effect of the FCC decision is to determine the profile and substance of the land mobile radio communications services that will be available to the American public until approximately the end of this century. The proceeding was instituted because existing land mobile radio systems have virtually exhausted the radio spectrum heretofore available to them.

Land mobile radio communications service is the use of radio signals for communications between fixed transmitting (base) radio stations and moving vehicles, or between moving vehicles themselves. It was expressly defined and included in the Act.[3] The service takes three forms: two-way radiotelephone service (which by definition requires interconnection of the radio facilities with the telephone network); two-way dispatch service (which by definition does not involve interconnection with the telephone network); and one-way paging service (which was excluded by the FCC from this case). The service is available from two types of radio systems: common carrier systems licensed and regulated under the Act (both telephone companies and the independent RCCs represented by

[1] Pet. App. 1a-33a.

[2] Pet. App. 34a-273a.

[3] 47 U.S.C. §§ 153(1), (m) and (n).

petitioner operate such systems); and private systems licensed for individual or cooperative (not-for-hire, non-profit) shared use.[4]

The briefs in opposition relate to the following basic issues:

a. *Monopoly; AT&T; The Cellular System; Interconnection.* The only spectrum allocated by the FCC for licensing on a common carrier basis is a 40 MHz block which is available exclusively for a nationwide "cellular" radio system which will not be in general operation until at least sometime in the 1980's; no allocation was made for any other type of common carrier system. The cellular system is authorized to provide both radiotelephone and dispatch communications services.

In substance, as found by the court below, the practical effect of this allocation and its attendant rules and policies will be to confer a "virtual monopoly" of the cellular system on American Telephone and Telegraph Company ("AT&T"); to destroy the "highly competitive environment" in which radiotelephone service is presently provided (i.e., to destroy the com-

[4] In this connection, we respectfully point out that contrary to the statement of the government (Gov. Br., p. 3), "radiotelephone" communications service is *not* synonymous with "public" or "common carrier" service. Radiotelephone service is only one form of communications service which can be obtained from a common carrier radio *system*. (The court below carefully made this distinction. See Pet. App. 5a). Similarly, "dispatch" communications service is *not* synonymous with "private" service; dispatch service is only one form of communications *service* which can be obtained from a private radio *system*. (See *ibid*). Indeed, it is the FCC's persistent attempts to equate dispatch *service* with private radio *systems* that led to its unlawful deregulation of entrepreneurial, for-hire, for-profit Specialized Mobile Radio Systems (see *infra*).

petition presently provided by the RCCs represented by petitioner); to replace that environment with one which AT&T will "dominate substantially"; and to permit AT&T, for the first time, to become a "significant force" in the "highly competitive" dispatch service. (Pet. App. 11a-13a).

The court also found, in substance, that the FCC's treatment of the monopolistic and anticompetitive consequences of its order, "even perceived most favorably," is "largely cosmetic." (Pet. App. 13a).

b. *SMRS; Deregulation of Common Carriage; Preemption.* The only other allocation made by the FCC was a 30 MHz grant to so-called "private" radio systems. These frequencies are to be available on a "first-come, first-served" free-entry basis. However, in addition to traditional private systems (i.e., those operated by licensees for their own use on an individual or co-operative shared-use basis), the FCC authorized in this block entrepreneurial, for-hire, for-profit licensees known as Specialized Mobile Radio Systems ("SMRS").

The FCC itself recognized that the "entrepreneur-operated" SMRS "could be licensed as common carriers and regulated under Title II of the Communications Act" (Pet. App. 54a), and the court below found that it is "undisputed" that the FCC decision authorizes SMRS in fact to operate as common carriers (Pet. App. 26a). But the FCC refused to classify SMRS as common carriers or apply the common carrier provisions of the Communications Act to them (an action which, it confessed, is "not free from doubt").[5] It

[5] Pet. App. 157a.

refused to do so, in substance, because it believed that common carrier regulation is too burdensome administratively. The FCC ruled, as a matter of law, that it has (as characterized by the court below) the "unfettered discretion . . . to confer or not confer common carrier status on a given entity, depending upon the regulatory goals it seeks to achieve" (Pet. App. 26a); and it preempted by fiat, on the grounds of federal "primacy," the power of state regulatory agencies to certificate SMRS as common carriers.

c. *Vertical Integration; Motorola.* The FCC also authorized radio equipment manufacturers to become SMRS. Thus, for the first time in history, Motorola, Inc. (which, as found by the court below, "enjoys substantial domination of the sales market for mobile radio systems")[6] will be allowed to vertically integrate its operations by also entering the radio carrier business in direct competition with its RCC customers.

d. *Appellate Review.* Notwithstanding findings of "substantial anticompetitive effects," the court below upheld the cellular allocation, "subject to . . . challenge at some future date," and without comment "upon the possible success of any antitrust actions which may in the future be brought." (Pet. App. 16a, 33a). The court unequivocally rejected the FCC's claim of discretionary power to confer common carrier status, but it held that SMRS will not be common carriers if they engage in discriminatory dealings with the public (i.e., if they operate on a "highly individualized basis") and do not serve the public "indifferently" (Pet. App. 23a-26a). The court upheld the FCC's classification of SMRS as non-common carriers on the basis of this sub-

[6] Pet. App. 30a.

stituted rationale, subject to "renewed attack if it is later concluded that SMRS are in fact common carriers." (Pet. App. 33a).

Similarly, although the vertical integration of Motorola, Inc., could "discourage competition," the court upheld its authorization to become an SMRS, noting that such authorization "may provide cause for independent antitrust actions." (Pet. App. 30a). Lastly, on the basis of its holding that SMRS are not common carriers, and despite the fact that its holding is expressly subject to "renewed attack," the court upheld the FCC's anticipatory preemption of state regulation. (Pet. App. 31a-32a).

REPLY ARGUMENT

In light of the extraordinary number of reasons which demonstrate that certiorari should issue in this case, respondents' rather narrow and obviously labored opposition is without merit and should be rejected.

1. *Importance of the Case.* The government does not dispute (and apparently concedes) that the importance of the case, *inter alia,* to the mobile radio industry and the 550 independent, small RCCs; to four million present users and many public agencies and private business enterprises; to basic antitrust and antimonopoly objectives of our law and national policy; to the fundamental definition and application of the "common carrier" concept of the Communications Act and our regulatory laws; to federal-state relations; to the interpretation and application of the Communications Act; and to the principles of judicial review of agency action; merits review by this Court.

Instead, the government argues that the "comprehensive exploration" of the record by the court below

means that there is "no reason" for review by this Court. (Gov. Br., p. 12). This argument is obviously erroneous, in light of the conflict of the result below with the governing decisions of this Court (see *infra*). In any event, the fact remains, we submit, that this case is of such vital public importance that this Court should grant review.

2. *Conflict with Decisions of this Court.*

a. *Gulf States Utilities Co.* v. *FPC*[7] *and the monopoly/vertical integration issue. Gulf States* held that the "public interest" standard of a regulatory statute (which is controlling in the present case) requires application of antitrust standards by administrative agencies as a *"first line of defense* against those competitive practices that might later be the subject of antitrust proceedings." (411 U.S. at 760. Emphasis added). The government argues that the cellular system allocation and the authorization of Motorola as an SMRS, affirmed by the court below, is not in conflict with this mandate. The government suggests that the FCC "adequately considered competitive factors" in its decision, and that the court so found. (Gov. Br., pp. 12-14). We respectfully submit that this is a strained and insupportable analysis of the court's decision.

The court specifically characterized the FCC's treatment of the cellular system's antitrust implications—even when "perceived most favorably"—as "largely cosmetic". (Pet. App. 13a). This is the precise *antithesis* of a holding that the FCC "adequately considered" competitive factors; and it is likewise the precise *antithesis* of applying antitrust standards as a *first*

[7] 411 U.S. 747 (1973).

line of defense in agency decisions, as required by *Gulf States.*[8]

Similarly, authorizing the vertical integration of Motorola *first,* and remitting parties to "independent antitrust actions" *later,* obviously is in precise *contradiction* to the requirement of *Gulf States* that antitrust standards be applied as a "first line of defense" to forestall those business practices that would otherwise "later be the subject of antitrust proceedings".

Gulf States was neither cited nor reconciled by the court below. The government's attempt now to avoid its force clearly is wishful revisionism and should be rejected by this Court.[9]

b. *FPC* v. *Texaco, Inc.*[10] *and deregulation. Texaco* held that an administrative agency does not have the power "to set at naught an explicit provision" of its organic statute (417 U.S. at 394), or to substitute for

[8] The crucial importance of this doctrine in the present case is underscored by the fact that the Department of Justice, in the most massive antitrust proceeding in history, is presently seeking to break up AT&T and its affiliates—the same entities which threaten to monopolize radiotelephone service under the instant decision—for their monopolistic practices in this precise field. Complaint, ¶¶ 28(b), 29(c), *United States* v. *American Telephone and Telegraph Company et al.,* D.C.D.C. Civ. Action No. 74-1698 (Nov. 20, 1974).

[9] Both *United States* v. *Midwest Video Corp.,* 406 U.S. 649 (1972), and *United States* v. *Southwestern Cable Co.,* 392 U.S. 157 (1968) (cited by the government at p. 14), dealt with the FCC's power to regulate new communications services not contemplated or provided for by the Communications Act (unlike mobile radio service). They in no way dealt with the question of the FCC's responsibility for "new departures in regulated service" and their citation by the government for such a proposition is in error.

[10] 417 U.S. 380 (1974).

regulatory jurisdiction which the statute mandates, a scheme by which the market place would be the regulator (precisely what the FCC purports to do in the present case). (417 U.S. at 395-399). The government argues that the FCC's explicit deregulation of the newly-invented, entrepreneurial, for-hire, for-profit purveyors of communications services to the public (the SMRS), is not contrary to *Texaco* because SMRS are not common carriers, and because SMRS will be regulated as radio licensees rather than as common carriers.

However, the court below held that the SMRS are authorized by the FCC decision to operate as common carriers and may so operate in fact (Pet. App. 26a, 33a); and we respectfully submit that SMRS clearly are common carriers within the meaning of the Communications Act (see *infra*). Moreover, the court further held that the radio licensing provisions of the Act cannot be substituted for its common carrier provisions, as the FCC sought to do. (Pet. App. 27a-28a). It follows, therefore, that the FCC's avowed attempt (in its words) "to shed this heavy cloak [the common carrier provisions of the Act] and exchange it for one with far greater flexibility" (Pet. App. 59a) is in direct conflict with this Court's ruling in *Texaco.*

c. *Head* v. *New Mexico Board of Examiners; Florida Lime and Avocado Growers* v. *Paul;*[11] *preemption.* The decisions of this Court governing preemption require either "such actual conflict between [state and federal] schemes of regulation that both cannot stand in the same area, [or] evidence of a congressional design to preempt the field.' *Florida Lime and Avocado*

[11] 374 U.S. 424 (1963); 373 U.S. 132 (1963).

Growers v. *Paul,* 373 U.S. 132, 141, 83 S.Ct. 1210, 1217."[12] The government argues that the FCC's anticipatory preemption in this case is not in conflict with these principles, first, because §§ 2(b) and 221(b) of the Communications Act, 47 U.S.C. §§ 2(b), 221(b) (which expressly preserve state jurisdiction over intrastate communications service), apply only to common carriage; and second, because the government alleges that "restrictive entry policies under some state regulatory schemes pose a direct conflict with the authority the Commission has asserted". (Gov. Br., p. 16).

Obviously, the government's argument proves too much and clearly demonstrates that its position is untenable. The so-called "restrictive" state statutes referred to by the government apply only to "common carriers." Assuming *arguendo* (as the government contends) that SMRS in fact are not common carriers, there is no conflict at all between state and federal regulation; and preemption by the FCC would be idle and unnecessary.

On the other hand, assuming (as we contend) that SMRS in fact are common carriers, §§ 2(b) and 221(b) conclusively negate any inference of a Congressional design to preempt the field. Moreover, there is clearly no conflict between the state and federal schemes of common carrier regulation. Under any of these circumstances, therefore, the preconditions for preemption required by the decisions of this Court are wholly unsatisfied.

[12] *Head* v. *New Mexico Board of Examiners, supra,* at 430.

d. *SEC* v. *Chenery Corp.;*[13] *rule governing appellate review of agency action.* The court below rejected the FCC's legal theory for deregulation of the SMRS (i.e., that it has the discretionary power "to confer or not confer common carrier status on a given entity, depending upon the regulatory goals it seeks to achieve"); but it affirmed the FCC's decision to deregulate SMRS on a completely different basis: *viz.,* on the ground that SMRS might not elect to serve the public "indifferently," but may instead elect to pick and choose among the public to be served.

Both the government and NABER argue strenuously that the court's decision does not conflict with that "simple but fundamental rule of administrative law," *SEC* v. *Chenery Corp.,* 332 U.S. 194, 196 (1947), namely, that "an administrative order cannot be upheld unless the grounds upon which the agency acted . . . were those upon which its action can be sustained." *SEC* v. *Chenery Corp.,* 318 U.S. 80, 95 (1943). However, they cannot agree as to why no such conflict is presented.

NABER argues narrowly that a substituted rationale is impermissible only when the determination is one which the "agency alone is authorized to make," and that the function of statutory interpretation (of the term "common carrier") is one which courts may properly perform. (NABER Br., p. 10). Thus NABER *concedes* that the court substituted its own rationale for that of the FCC, but argues that it was a *permissible* substitution.

On the other hand, the government argues that the FCC's rationale was based "in part" on the theory

[13] 318 U.S. 80 (1943).

advanced by the court. Thus, the government does not contend that there was a permissible substitution; it *denies* that there was any substitution at all.

The government's argument is plainly in error, because the court expressly conceded that it did not find its theory for affirming the FCC within the FCC decision itself. (Pet. App. 27a, fn. 76).[14] NABER's theory is equally without merit, since the effect of the court's decision is to reshape, in a manner fundamentally inconsistent with the FCC's plan for SMRS, the role which SMRS are to play in providing mobile radio service to the public.

There can be no dispute that it is the FCC's duty (not that of the court) to provide for adequate public access to mobile radio service. In attempting to fulfill that duty, the FCC assumed that the SMRS would provide general public access to the vast public domain which it allocated; the FCC couched its public interest rationale on this premise and on the assumed discretionary power to deregulate mobile radio service. Contrary to the FCC's basic premise, however, the court's affirmance would preclude SMRS from serving the public generally, because to do so the SMRS would be operating as common carriers and they would be operating unlawfully.

Remand of the instant decision clearly would not be a useless formality disfavored by this Court.[15]

[14] Accordingly, the decision in *Penn-Central Merger Cases*, 389 U.S. 486, 526, fn. 14 (1968) (Gov. Br., p. 18), is inapposite. In that case, the Court found that the reviewing court agreed in substance with all of the major findings of the agency; the court below plainly did not do so in this case.

[15] *Cf.*, e.g., *National Labor Relations Board* v. *Wyman-Gordon Co.*, 394 U.S. 759, 766, fn. 6 (1969).

Rather, remand would permit the FCC to provide for truly public access to the 900 MHz band, as it originally sought to do, and to do so on a basis which is both lawful and reasonable.

3. *The Common Carrier Issue.* The government does not suggest that the definition of "common carrier" (47 U.S.C. §153(h)) is not an issue of fundamental and recurring importance in the interpretation and application of the Communications Act, or that the question has been settled by prior decisions of this Court.[16] Rather, the government merely asserts that the "court of appeals correctly concluded that SMRS are not common carriers." (Gov. Br., p. 14).

With all due respect, we submit that the government's position studiously ignores the fundamental eccentricity of the court's construction and application of the common carrier concept in this case. The basic purpose of the concept, as set forth in the Act, is to *require* indiscriminate service to the public by those who seek to use the public domain "for-profit" and "for-hire", on an entrepreneurial basis; and to provide such service "upon reasonable request." (47 U.S.C. §201(a)). The SMRS by definition seek to use the public domain on an entrepreneurial, "for-hire", "for-profit" basis; they are authorized and expected, under the FCC's decision, to service the public. But the court's decision excludes SMRS from classification as common carriers if they, in fact, *voluntarily* discriminate among the public and refuse to serve it. Such result obviously is in derogation of and threatens to

[16] In contrast, NABER attempts to argue that the issue is well settled, but cites no authority for this proposition. (See NABER Br., p. 9).

undermine the entire legal framework for common carrier regulation.[17]

Under these circumstances, we submit that the court's construction of "common carrier" for purposes of the Communications Act is clearly in error, and that the issue is of such great importance that it should be reviewed by this Court.

4. *The Function of Appellate Review.* The decision of the court below is replete with findings of palpable departures by the FCC from the mandate of the Communications Act and the law with respect to the antitrust component of the "public convenience, interest or necessity" standard of the Act and its common carrier requirements. But the court refused to set aside the FCC's decision on the premise that relief from its infirmities must await its implementation. The government argues that the court's affirmance is proper in all respects, because it "correctly recognized" the "contingent and developmental nature" of the FCC's decision. (Gov. Br., p. 12).

We respectfully submit that the government's position defies credibility. There was nothing tentative or contingent about the FCC's policies for cellular systems until the court decided that, as conceived by the FCC, they could not lawfully be implemented. AT&T represents that it has already spent $20 million on its cellular system and anticipates spending an additional $23.5 million on the system through 1978.[18] If that

[17] *Cf.*, e.g., *United States* v. *Drum*, 368 U.S. 370, 375, 376 (1962) (Motor Carrier Act of 1935) (application of the concept requires "reference to the clear but broad remedial purpose of a regulatory statute committed to agency discretion").

[18] These figures were submitted by AT&T, rsepectively, to the court below on May 15, 1975, and to the FCC on July 31, 1975.

system is deployed as the FCC's order contemplates, the system could be characterized as "developmental" only by disregard of the obvious facts of business and regulatory life and the facts of this case.

There was likewise nothing "contingent" or "developmental" about the FCC's decision to deregulate mobile radio service; to authorize an essentially unlimited class of entrepreneurs to invest hundreds of thousands of dollars in SMRS; to create vested interests in operations and plant investments where none now exists; and to authorize Motorola to deploy vertically integrated market power in competition with its RCC customers.

The court below found "substantial anticompetitive effects" resulting from the FCC's cellular policies; the court below found that the vertical integration of Motorola authorized by the order "could discourage competition" and "may provide cause for independent antitrust actions" at a later date; the court below found that if "SMRS in practice behave as common carriers" (which behavior it is "undisputed" that the FCC decision authorizes), the FCC's order "will be open to renewed attack."

We submit that these are plainly not recitals of "contingent and developmental" policies which should be accorded deference; they are substantial and material infirmities which the reviewing court may not lawfully rubber-stamp, subject to such future private or administrative remedies as may appear. See the Administrative Procedure Act, 5 U.S.C. § 706(2).

CONCLUSION

For the reasons stated herein and in the petition, a writ of certiorari should issue to review the judgment and opinion of the United States Court of Appeals for the District of Columbia Circuit.

Respectfully submitted,

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